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**DEPARTMENT OF SCHOOL NUTRITION SERVICES**

DATE: Sept. 12, 2023  
TO: Mr. Jesse Bacon, Superintendent *JB*  
FROM: Todd Crumbacker, Director of School Nutrition Services (SNS)  
RE: Signatures requested for amended Procurement Plan for SNS

Submitted for approval is an updated Procurement Certification and Procurement Plan (Procedure) for School Nutrition Services for the purchases of all operational necessities for the National School Lunch, School Breakfast, Afterschool Snack, and Summer Food Service Programs. The attached plan is the most updated templated prototype provided by the Kentucky Department of Education (KDE), School and Community Nutrition under the guidance of the United States Department of Agriculture (USDA). *An amendment has recently been made to this procurement plan, therefore, I am requesting signatures for the approval of this plan to be adopted beginning Sept. 26, 2023 and remain in effect from this date forward until amended.*

As KDE and USDA continue to provide regulatory changes, this procedure will stand as a living document and can/will be amended as needed for program compliance and district needs.

Please let me know if you need additional information regarding this request.

School Nutrition Services Procurement Plan amended Sept. 25, 2023

**OUR MISSION IS TO INSPIRE AND EQUIP OUR STUDENTS TO SUCCEED IN LIFE**

**BULLITT COUNTY PUBLIC SCHOOLS IS AN EQUAL EDUCATION AND EMPLOYMENT INSTITUTION**

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# **CHILD NUTRITION PROGRAM PROCUREMENT PLAN**

**BULLITT COUNTY  
Board of Education**

**BULLITT COUNTY BOARD OF EDUCATION**

This procurement plan provides a written description of the procurement procedures that are used when procuring goods and services for the federal Child Nutrition Program. SFAs are required to have and use written procurement procedures that comply with the federal regulations, laws, and policies. However, SFAs must also follow any applicable State and local procurement requirements when they are stricter than but not in contradiction to what is federally required.

While not required by SCN for this procurement plan to have an official approval by the schools governing body or administration, it is important that they are knowledgeable of the procedures that are reflected in this document and understand that they must be used when procuring for the Child Nutrition Program. These procedures should be reviewed at least once annually and updated at the frequency needed to remain current with what is required for the SFA to follow.

This procurement plan will be implemented beginning **July 1, 2023** and will continue to be implemented until amended.

\_\_\_\_\_  
Superintendent of Schools

\_\_\_\_\_  
Date

\_\_\_\_\_  
Child Nutrition Program Director

\_\_\_\_\_  
Date

\_\_\_\_\_  
School Finance Officer

\_\_\_\_\_  
Date

## **Section A: General Procurement Standards 2 CFR 200.18**

### **Written Procurement Procedures 2 CFR 200.318(a):**

The SFA must have and use documented procurement procedures that are consistent with the standards identified in 2 CFR 200.317 through 200.327 as well as applicable state, and local laws and regulations for the acquisition of property or services required for the Federal Child Nutrition Program.

This procurement plan provides the written procurement procedures that are reflective of the federal procurement requirements that must be followed, and state and local policies that are allowable by federal regulations or more strict than what is federally required.

### **Contractor Administrative Oversight 2 CFR 200.318(b):**

SFAs are required to maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

Contract administration oversight refers to all steps taken after contract award to make sure the requirements of the contract are met. It encompasses all dealings between the SFA and the vendor from the time the contract is awarded until the work has been completed and accepted or the contract terminated, payment has been made, and disputes have been resolved. Collectively, oversight enables the SFA to evaluate vendor performance and document, as appropriate, whether they have met the terms, conditions, and specifications of the award.

The Director of School Nutrition Services is responsible for ensuring that the SFA conducts contract oversight by ensuring:

- ✓ Goods and services are provided as outlined in the solicitation and the resulting contract.
- ✓ Quantity and quality of the goods and services are received as requested.
- ✓ Goods and services are provided at the agreed upon time, locations, and conditions.
- ✓ The SFA's substitution policy is followed when required.
- ✓ The amount charged is the amount agreed upon in the awarded contracts and agreements.
- ✓ Vendors are contacted when disparities are found for resolution or correction.
- ✓ Vendors are deemed not responsible and therefore ineligible for future contract or purchase awards when such action is found to be reasonable due to poor performance and is adequately documented.

### **Standards of Conduct 2 CFR 200.318(c):**

The SFA must maintain written standards of conduct covering conflicts of interest and governing the actions of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent may participate in the selection, award, or administration of a contract supported by a federal award if he or she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The officers, employees, and agents of the SFA may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. However, SFAs may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal

value. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the SFA.

If the SFA has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the SFA must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the SFA is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

The School Food Authority/BCPS has implemented the following Code of Conduct; the below Code of Conduct directly reflects that of BCPS Policy 04.3.2 in relation to KSBA.

The following conduct will be expected of all persons who are engaged in the awarding and administration of contracts supported by Child Nutrition Program Funds.

- No employee, officer or agent of the School Food Authority/BCPS shall participate in the selection or in the award or administration of a contract supported by program funds if a conflict of interest, real or apparent, would be involved.
- Conflicts of interest arise when one of the following has a financial or other interest in the firm selected for the award:
  - a. The employee, officer or agent;
  - b. Any member of the immediate family;
  - c. His or her partner;
  - d. An organization which employs or is about to employ one of the above;
  - e. A less-than-arms-length transaction. This is one party's ability to control or influence the other party to the transaction. A less-than-arms-length transaction occurs:
    - i. When a transaction is conducted between related parties, meaning that the integrity of the transaction could be compromised;
    - ii. When one party to the transaction is able to control or influence the actions of the other party.
    - iii. Examples include:
      1. Hiring an administrator's relative as a favor;
      2. Purchasing goods or services from a business owned by an officer, employee, or relative of the Sponsor's entity.
      3. Agreement for equipment maintenance between a business and person who are related to the Sponsor's employees or board members.
- School Food Authority/BCPS employees, officers or agents must not solicit or accept gratuities, favors, or anything of monetary value from prospective contractors/vendors, potential contractors, or parties of subcontract.
- School Food Authority/BCPS must set standards when financial interest is not substantial, or the gift is an unsolicited item of nominal value and may be acceptable.

If established, the nominal amount identified is: \$50.00.

- Disciplinary actions to be applied for violation of School Food Authority/ BCPS written standard of conduct includes, but not limited to:
  - A. Reteaching of the procurement policies and procedures
  - B. Participation in mandatory procurement training offered by a credible source (KDE, ICN, etc.)
  - C. Possible loss of purchasing authority, depending on the nature of the violation
  - D. Suspension, dismissal, or removal

**Unnecessary or Duplicative Items 2 CFR 200.318(d):**

The SFAs procedures must avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis should be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

**Intergovernmental and Inter-Entity Agreements 2 CFR 200.318(e):**

To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use of shared services across the Federal Government, the SFA is encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services. Competition requirements must be met with documented procurement actions using strategic sourcing, shared services, and other similar procurement arrangements.

These types of agreements may include the use of contracts procured by cooperative groups, procurement agents, and third-party entities. SFAs may use contracts obtained through such agreements when the guidance outlined in policy memo *SP-05-2017, Q&A Purchasing Goods and Services Using Cooperative Agreements, Agents, and Third- Party Services* is followed.

- **A group of SFAs, procuring for SFAs:**

When an SFA is part of a co-operative group with other SFAs to collectively procure goods and services for their child nutrition programs, the resulting contracts may be used without further procurement actions required.

SFAs must ensure that all contracts were procured in an acceptable manner and obtain a copy of all documentation of the procurement process for their records prior to use. When procuring as a group, each individual SFA remains responsible for monitoring contractor performance to ensure compliance with all contract provisions.

SFA only co-operative groups include groups where two or more SFAs come together to jointly procure goods or services, SFA only groups within an Education Service Center that procure contracts exclusively for the use of the SFAs in their member schools, and CNP State Agencies.

The Bullitt County Board of Education uses a co-operative recognized under Kentucky state law that has contracted with a GPO aka third party buying agent. A copy of the co-operative's procurement plan is available upon request.

- GPO aka Third Party Purchasing Services were competitively procured using a competitive bid process.
- A copy of the solicitation and final awarded contract is available upon request.

The GPO conducts the following procurement on behalf of the SFA:

As outlined in the Request for Proposal for a GPO aka Third Party Purchasing Service, the purpose is to contract with a third party to perform purchasing services on behalf of current and future participating members of the Ohio Valley Educational Cooperative for School Food Service food, supplies, materials, and USDA (processed) Commodities at competitive prices according to all state and USDA rules per CFR Part 200.318-.326 for a Group Purchasing (Buying) Organization. As the awarded service provider, HPS has agreed to the project scope including but not limited to:

- A. Provide procurement services that meet all Federal and State guidelines for items and related services.
- B. Provide an acceptable electronic method to analyze bids and keep track of orders, rebates, deliveries, invoices, and quarterly reports
- C. Provide methods of purchasing volatile items, which may change weekly, such as fresh produce and dairy, etc. per price schedule.
- D. Provide methods of purchasing items which pricing may change daily or weekly. GPO must have the ability to adjust pricing of items properly procured, including fresh produce, milk, and other items that price will regularly fluctuate. GPO must have a mechanism in place for these items.
- E. Provide the capability for certified public accountants to audit Distributors on behalf of current and future Ohio Valley Educational Cooperative participating member public school districts once bidding and contracts are issued.
- F. Provide Fee structure for services.
- G. Provide contracts, pricing and information, catalogs, search information, technical information, etc. via a web site.
- H. Provide staff to assist current and future participating districts as needed.
- I. Provide the capabilities to procure distribution of USDA commodity products if requested.
- J. Provide copies of all procurement documents.
- K. Provide input and evaluation of food items, supplies and materials bid/proposal responses prior to award.
- L. Provide information of any nutritional facts, CN label or bid specification sheet as per request
- M. Provide manufacturer incentives and/or rebates in which savings or discounts are passed directly back to the participating SFA's preferably in the form of a credit off invoice. Rebate checks are also acceptable

A copy of the GPO's procurement plan is available upon request.

OVEC, on behalf of SFA members, uses the procurement services of the Kentucky Educational Development Corporation (KEDC) for Dairy and Bakery products. In addition, BCPS utilizes these same procurement services for beverage and ice cream products.

- A copy of the KEDC's procurement plan is available upon request.

The GPO conducts the following procurement on behalf of the SFA:

- In addition to the School Food Purchasing Program, the entire HPS program offerings are available to all OVEC members. All HPS contracts have been competitively procured, outside the food service category, the main difference in procurement activities are the Request for Proposals are only advertised on bidnet.com and there is not a public bid opening. Therefore, refer the HPS Request for Proposal process included. Each school

district should refer to their small purchases bid ceiling as set by their school board to determine if the HPS contract should be utilized as on the 3 quotes required to purchase.

- In regards to the HPS Furniture, Finishes, and Equipment Program:  
OVEC School districts can utilize the HPS FFE services as one quote. HPS does not competitively procure these products/equipment. HPS is a dealer for equipment and furniture and passes on the dealership discounts as a savings through the quotes they provide to school districts. Therefore, each school district should refer to their small purchases ceiling as set by their school board to determine if other quotes are needed in addition to the HPS FFE quote in order to compare pricing and make the purchase.

**Two or more SFAs coming together to jointly procure contracts:**

When two or more SFAs agree to jointly procure together to take advantage of volume pricing for products or services procured in one contract, the resulting contract may be used by those SFAs without further procurement actions. The group of SFAs, as defined in the scope of the solicitation, cannot materially change from the original group who plan to purchase together. Forecasting activities conducted prior to the formation of this cooperative should include actual and potential members of the cooperative and the solicitation should clearly define the expected level of members in the scope.

**Educational Service Centers:**

Educational Service Centers that provide services that procure contracts specifically for the use by the SFAs in their member school districts may be used without further procurement actions. These SFA only cooperatives must follow, at a minimum, the federal procurement regulations when procuring goods and services for its members.

**CNP State agency cooperative agreements:**

Although not a co-op, contracts procured by the state agencies that administer the child nutrition programs in the state may be used without conducting further procurement by SFAs. In Kentucky this includes KDE contracts (e.g. Point of Service contract) and KDA contracts (e.g. Hauling of commodities).

Whenever a SFA only group purchasing model is used:

- The procurement must be conducted in compliance with the procurement standards that apply to an individual SFA. This includes the procurement requirements in 7 CFR 210, 7 CFR 220, 2 CFR 250 and 2 CFR 200.317-.327, as well as any state and local procurement standards, if more restrictive.
- Solicitations must be published and clearly identify all product descriptions, specifications, and estimated quantities required, and all terms, conditions, required contract provisions as applicable.
- When applicable, the solicitation and contract must outline how the allocable portion of each discount, rebate and/or credit will be returned and/or disclosed to each participating SFA.
- When applicable, the solicitation and contract must also outline how each proportionate value



pass-through method for crediting the value of USDA foods will be returned and/or disclosed to each participating SFA.

If an SFA determines that additional goods and services are needed but were not procured by the SFA only co-operative group, the SFA must conduct a separate competitive procurement process following their own procurement procedures to purchase them.

- **Procurement Agents:**

If a procurement agent was used to procure a contract available through an intergovernmental or an interagency agreement, the procurement agent must have been properly procured. A procurement agent is an individual or business authorized to act on an entity's behalf. Agents must have been procured using one of the federal procurement methods that contractually required them to conduct all competitive procurements with the SFAs interests solely in mind. SFAs must ensure that all contracts were procured by a procurement agent in an acceptable manner and maintain all documentation of the procurement process in their records prior to use.

Procuring a procurement agent:

1. The scope of duties and responsibilities of the procurement agent must be clearly defined in the solicitation, as well as how prices/costs for services are to be quoted for evaluating agents' bids/responses for contract award.
2. When fees are charged, the SFA must ensure that the fees are fixed based on a purchase unit, volume or cost (fees cannot be a percentage of cost). Agents cannot be considered if they do not openly provide the full price per purchase unit for their service. Paying a fee does not constitute a solicitation or contract with an agent.
3. Ensure that the following required solicitation and contract language is included:  
"When procuring goods or services for their client, agents must follow procedures consistent with 2 CFR Part 200.317-.327 and applicable program regulations" (including state and local procurement requirements if more restrictive).

Procurement agents must be required to confirm in their response to the solicitation that they will represent the client and will have the client's best interests exclusively in mind when preparing solicitations for publication on the client's behalf. The agent may not have any conflict of interest, real or apparent. For example, **the agent may not use pre-existing contractual relationships in lieu of conducting a competitive procurement on behalf of the SFAs.**

The SFA is responsible for monitoring the Agents' performance and ensure compliance with all program requirements. This includes that the agent includes in published solicitations and contracts all terms, conditions, required contract provisions, as applicable, and all products descriptions, specifications, and estimated quantities required.

In order to ensure free and open competition, a procurement agent must:

- Work closely with the SFA to understand their needs.
- Develop solicitations on the SFAs behalf consistent with 2 CFR Part 200.317-.327 and the applicable program regulations as required for SFAs.
- Award contracts only to responsible contractors whose bid/offer is lowest/most advantageous to the Program with price as the primary factor, award fixed-price or cost-reimbursable contracts, as specified by the Program operator, or State agency, as applicable, and, monitor the ensuing contract on behalf of the Program operator as required in 2 CFR 200.318(b), if specified in the original solicitation and resulting contract.

- An agent publishing a solicitation on behalf of an SFA may not respond to the solicitation themselves.

- **Third-Party Entities:**

Contracts available to SFAs through sources such as state contracts, non-SFA only co-operative groups, and other agreements may only be used as one response or one source of price in response to the SFAs competitive procurement. Prior to accepting a contract as a price source for their procurement, the SFA must obtain a copy of all documentation of the procurement process for their records and ensure that the contracts were properly procured in compliance with the federal regulations.

**Non-CNP State Agency Agreements and Contracts:** The SFA may consider a non-CNP state agency (i.e., Ky Finance Cabinet) procurement as one response or one source of price when conducting a competitive procurement. For example, if the purchase is under the SFAs micro-purchase threshold, the SFA may purchase directly from the state's procured sources using micro-purchase procedures. If the procurement is less than the SFAs small purchase threshold, the SFA may obtain a price or rate quotation from the state's procured sources.

For procurements over the SFAs small purchase threshold, the SFA must:

1. Conduct a cost analysis,
2. Develop a solicitation (sealed bid or competitive proposal), and
3. Use the contracted vendors and prices from the State's contract as one response or source.

The procurement of the non-CNP state contracts do not replace the competitive procurement process that is required to be conducted by the SFA. Rather, the non-CNP state contracts give SFAs additional sources that may be utilized when conducting a competitive procurement.

**Inter-agency agreements:** Inter-agency agreements can include contracts procured by non-SFA only cooperatives, contracts procured and available for use by both SFAs and non-SFA entities or may be contracts that are procured by the district or individual schools.

Similar to the Non-CNP state agency contracts, SFAs may consider these agreements or contracts as one response or one source of price when conducting a competitive procurement. If the purchase is under the SFAs micro-purchase threshold, the SFA may purchase directly from these sources using micro-purchase procedures. If the procurement is less than the SFAs small purchase threshold, the SFA may obtain a price or rate quotation from these sources.

For procurements over the SFAs small purchase threshold, the SFA must:

1. Conduct a cost analysis,
2. Develop a solicitation (sealed bid or competitive proposal), and
3. Use the contracted vendors and prices from the inter-agency contract as one response or source.

The procurement of the inter-agency contracts does not replace the competitive procurement process that is required to be conducted by the SFA. Rather, the inter-agency contracts give SFAs additional sources that may be utilized when conducting a competitive procurement.

**Group Purchasing Organizations:** The business model of a GPO may include a variety of services such as facilitating procurement for their members/member agencies and procuring products and services from an external source such as an affiliated or unaffiliated full-line distributor. Other examples that GPO's may be called include third party purchasers, group buying organizations, and procurement cooperatives.

Paying a membership fee or conducting a formal procurement for the services of a GPO does not constitute compliance with the competitive procurement process that must be followed by SFAs to enable the use of the GPOs contracts, price lists, discounts, or services outside of the SFA conducting a competitive procurement process. Similar to the Non-CNP state agency contracts, and inter-agency agreements, the SFA may consider the prices available through the GPO contracts or agreements as one response or one source of price when conducting a competitive procurement. SFAs may pay a membership fee to multiple GPOs and when using micro or small purchase procedures and may consider the price for products from GPOs as one source among an adequate number of qualified sources.

For procurements over the SFAs small purchase threshold, the SFA must:

1. Conduct a cost analysis,
2. Develop a solicitation (sealed bid or competitive proposal), and
3. Use the contracts and prices from the third-party entity as one response or source, or the GPO may independently respond to the solicitation.

The procurement of access to the services of a third-party entity or the payment of a membership fee does not replace the competitive procurement process that is required to be conducted by the SFA. Rather, the third-party entity provides an SFA additional sources that may be utilized when conducting a competitive procurement.

- **Piggybacking onto Existing Contracts:** Prior to piggybacking onto an existing contract, the SFA must obtain the documented history of the procurement in order to determine that contract was procured in compliance with 2 CFR Part 200.318-.327 and the applicable program regulations.
  - The procurement history documentation collected must include all documents demonstrating the details of the procurement that is relevant for the procurement method conducted.
  - Contracted parties considering additional parties must have included a provision allowing "piggybacking" or the addition of additional entities in their contracts in order to avoid creating a material change. If such a provision is not included in the contract, the SFA may not use the existing contract.
  - For contracts containing this provision, the language used should specify the applicable limitations of the extension (e.g., dollar value or the number of additional parties that may be added).
  - Such contracts must be thoroughly reviewed by the SFA to ensure that the contract will meet their needs and conform to all applicable program requirements.

The Director of School Nutrition Services is responsible for obtaining all documentation detailing the procurement of contracts available through intergovernmental and inter-entity agreements, reviewing them to ensure that they were properly procured, and determining if they are able to be used without the use of additional procurement procedures by the SFA.

#### **Excess and Surplus Property 2 CFR 200.318(f):**

The SFA should utilize federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

#### **Responsible Contractors 2 CFR 200.318(h):**

The SFA must award contracts only to responsible contractors possessing the ability to perform

successfully under the terms and conditions of a proposed procurement. Consideration will be given to matters such as contractor integrity, compliance with public contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

**Procurement Records 2 CFR 200.318(i):**

The SFA will retain records sufficient to detail the history of procurement. These records include, but are not limited to, the rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

**Settlement of Issues 2 CFR 200.318(k):**

The SFA alone is responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the SFA of any contractual responsibilities under its contracts. FNS will not substitute its judgment for that of the SFA unless the matter is primarily a federal concern. Violations of law will be referred to the local, state, or federal authority having proper jurisdiction.

## **Section B: Competition 2 CFR 200.319**

### **Full and Open Competition 2 CFR 200.319(a):**

All procurement transactions when purchasing goods or services for the Child Nutrition Program must be conducted in a manner that provides full and open competition that is consistent with the federal regulations.

### **Objective Contractor Performance 2 CFR 200.319(b):**

In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements.

Situations considered to be restrictive of competition include but are not limited to:

- 1) Placing unreasonable requirements on firms in order for them to qualify to do business;
- 2) Requiring unnecessary experience and excessive bonding;
- 3) Noncompetitive pricing practices between firms or between affiliated companies;
- 4) Noncompetitive contracts to consultants that are on retainer contracts;
- 5) Organizational conflicts of interest;
- 6) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance or other relevant requirements of the procurement; and
- 7) Any arbitrary action in the procurement process.

### **Geographic Preference 2 CFR 200.319(c):**

The use of state, or local geographical preferences in the evaluation of bids or proposals is prohibited, except as expressly allowed by USDA to mandate or encourage geographic preference.

As amended, the National School Lunch Act (NSLA) allows SFAs receiving funds through a Child Nutrition Program to apply a geographic preference when procuring unprocessed, locally grown or locally raised agricultural products. The ability to apply a preference for local products applies only to unprocessed or minimally processed items. The geographic preference rule does not apply to any products that have been cooked, heated, canned or that have any additives or fillers. It can be applied to a wide array of products that meet the definition of unprocessed or minimally processed such as various forms of fruits, vegetables, meats, fish, poultry, dairy, eggs, and grains.

Definitions for local vary widely depending on the unique geography and climate where a school is located and on the abundance of local food producers and manufacturers. Local may be defined as within a certain number of miles from the school, within the county, or within the state. Alternatively, definitions might include more than one state (i.e., Kentucky, and Tennessee) or distinct parts of states (i.e., specific counties in southwest Kentucky). In addition, different definitions of local can depend on the product or season.

When determining what will be considered local, the SFA must ensure that there is adequate competition within the defined area for the products to be procured. If there is inadequate competition in the defined geographic area, the SFA must re-examine their definition of "local" for the procurement.

Examples of how local may be defined:

1. The definition of local may be a generally described area for multiple unprocessed agricultural products procured at the same time.
  - Locally grown/raised means within a 400 (miles) radius of your school.
2. The definition of local may be defined differently depending on what is being procured and how much competition may be available within the defined area.
  - When procuring apples: Local means within 400 number of miles radius of your school.
  - When procuring grapes: Local mean within 400 number of miles radius of your school.

**Written Procedures for Procurement Transactions 2 CFR 200.319(d):**

The SFA will follow their written procedures for conducting procurement transactions to ensure that all solicitations:

1. Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a “brand name or equivalent” description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offers must be clearly stated; and
2. Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

**Vendor Lists 2 CFR 200.319(e):**

The SFA must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the SFA must not preclude potential bidders from qualifying during the solicitation period.

When SFAs use pre-approved vendor lists in their procurement activities the SFA directly solicits to the vendors on the list. In addition, SFAs must also publicly advertise the procurement as usual in order to allow for other potential bidders to qualify during the solicitation period.

When using a vendor list, SFAs must take actionable steps to ensure there is adequate free and open competition. Prior to using a vendor list an SFA should ensure:

1. The list is current.
2. A suitable number of qualified sources exist on the list.
3. When applicable, the products or services on the list are specific in nature, not just general such as “food”, “supplies”, etc.
4. All potential vendors had the opportunity to be on the list.
5. When applicable, all potential vendors were subject to the same evaluation and ranking criteria.
6. Vendors that did not request or, when applicable, compete for inclusion on the list are **not** included on the list.

7. The lists are updated at least annually.
8. The opportunity exists to add new qualified vendors.
9. Potential vendors are not prohibited from qualifying for inclusion on the list during the solicitation period.
10. A system exists to remove listed vendors, for cause.

**Noncompetitive Procurements 2 CFR 200.319(f):**

Noncompetitive procurements will only be conducted as allowed in accordance with 2 CFR 200.320(c).

### **Section C: Methods of Procurement to Be Followed 2 CFR 200.320**

The SFA must have and use documented procurement procedures, consistent with the standards of this section and 200.317, 200.318, and 200.319 for any of the following methods of procurement used for the acquisition of property or services required the operation and administration of the Child Nutrition Program. The SFA must utilize a federal procurement method for each purchase or procurement in which Child Nutrition Funds are expended.

- 1) Informal methods
  - Micro-purchases
  - Small purchases
- 2) Formal procurement methods
  - Sealed Bids
  - Competitive Proposals
- 3) Noncompetitive Procurement

Thresholds for these procurement methods are set at the federal level, the state level, and the local level. State and local thresholds may be more restrictive than the Federal thresholds, but they may not be more permissive than the federal levels. The most restrictive (lowest) threshold that applies to the SFA must be followed when conducting procurement.



**Procurement Method Thresholds**

<b>Procurement Method</b>	<b>Federal Threshold</b>	<b>*State of Kentucky Thresholds for Public Schools and Institutions</b> <input type="checkbox"/> <b>N/A (Nonpublic Schools and RCCIs)</b>	<b>*Local SFA Procurement Thresholds</b>	<b>Applicable Thresholds followed</b>
Micro-purchase	\$10,000	No threshold or restriction: (45A.380; KRS 424.260): <ul style="list-style-type: none"> <li>● Perishable Foods.</li> <li>● Professional services.</li> <li>● Replacement parts.</li> <li>● Supplies sold at public auction.</li> <li>● Contracted vendors offering discounts or reduced prices. (a.k.a. approved vendor lists)</li> <li>● Items that are on State, local, KEDC, or GSA bids.</li> </ul> \$5,000 or less: <ul style="list-style-type: none"> <li>● Items/services that are not available from approved vendors.</li> </ul> \$2,500 or less: <ul style="list-style-type: none"> <li>● Items/services that are cheaper than offered by approved vendors.</li> </ul>	<b>\$10,000</b> (same as state)	\$10,000
Small Purchase	\$250,000 or less	\$40,000 or less	<b>\$40,000</b> (same as State)	\$40,000
Formal (IFB/RFP)	Higher than Small Purchase Threshold	Higher than Small Purchase Threshold	Higher than Small Purchase Threshold	Higher than Small Purchase Threshold

1. If the state thresholds do not apply – Check N/A in the “State of Kentucky Thresholds for Public Schools and Institutions” column and disregard the thresholds identified.
2. Identify any thresholds that are found in local procurement policies and procedures and add them to the “Local SFA Procurement Thresholds” column.
3. Compare the federal, state (if applicable), and local thresholds and identify the strictest thresholds that will apply to the Child Nutrition Program in the “Applicable Thresholds Followed” column.

\*Applicable micro-purchase thresholds are not identified as a “micro-purchase threshold” in state law and will most likely will not be identified as a “micro-purchase threshold” in local policies. This verbiage is specific to the federal regulations and is used to describe when a procurement method that does not require multiple price quotes or a competitive solicitation process may be used. SFAs will need to identify the thresholds associated with any noncompetitive purchases that are allowable in their state or local policies but are not allowable use of noncompetitive procurement in the federal regulations when determining the micro-purchase threshold that they are required to follow. Micro-purchase procedures may not be used by the SFA if their local policies do not allow them to make any purchases without price quotes being obtained.

The procurement standard regarding records in 2 CFR 200.318(i) requires that the rationale for the procurement method used is documented in the records detailing the history of a procurement.

When determining whether to use informal or formal procurement procedures, there are two (2) main factors that should be considered:

1. The estimated value or cost of a purchase or procurement.
2. The length of time vendors may guarantee a price.

Estimated Value or Cost: An independent estimate of what the value or cost of an anticipated procurement should be determined early in the procurement process. There are multiple sources that an independent estimation of cost may be based on.

These include, but are not limited to:

- Published price lists, commercial catalogs or published commodity market indexes.
- Historical prices paid for same or similar items.
- Existing Federal contract prices
- Survey of other SFAs for what they pay, or price quotes received for the same or similar items.
- Information received through a Request for Information (RFI) process.

When using historical prices there may be known factors that will increase the estimated price, such as the consumer price index (CPI). These known factors should be included in your independent cost estimate.

If the estimated value or cost of the procurement is at or above the small purchase threshold, the procurement must be formally solicited. If the estimated value or cost of the procurement is below the small purchase threshold, the procurement may be informally solicited.

Length of time price is guaranteed: When price and/or availability of food items are subject to significant fluctuations it may not be feasible to find vendors who will guarantee a fixed bid price for a full year. Breaking these purchases up into smaller procurement transactions to benefit from market conditions may allow for the use of an informal procurement method.

The Director of School Nutrition Services is responsible for:

- Determining the value or cost of the procurement (aka independent cost estimate).
- Determine the procurement method that will be used.

#### **Informal Procurement Methods 2 CFR 200.320(a):**

There are two (2) informal procurement methods:

- Micro-purchase procedures
- Small purchases procedures

The SFA may utilize the informal procurement methods when the estimated cost of the goods and services to be procured will be below the applicable threshold for each method. Even in situations where micro-purchase procedures may be used, small purchase procedures should be utilized if it is determined to be more advantageous to do so.

**Micro-Purchase Procedures 2 CFR 200.320(a)(1):**

Micro-purchase procedures may be used when a single transaction for goods or services has an aggregate total cost that is equal to or less than the SFAs micro-purchase threshold. For purposes of micro-purchasing, a transaction is defined as “an occurrence in which two (2) or more entities exchange goods, services or money between or among them under an agreement formed for their mutual benefit.” To the maximum extent practicable, the SFA should distribute micro-purchases equitably among available qualified suppliers.

Micro-purchases may be awarded without obtaining price or rate quotes if the SFA considers the price to be reasonable based on research, experience, purchase history or other information. The SFA must document the reason for determining price reasonableness in their records.

Micro-Purchase Procedures:

1. PLANNING: Identify the goods or services to be procured, ensure that it is necessary to be purchased for the program, and identify the anticipated cost of the procurement.

The Director of School Nutrition Services is responsible for:

- Planning for the procurement.
- Ensuring the cost of the procurement does not exceed the SFAs micro-purchase threshold.

2. DEVELOP WRITTEN SOLICITATION: (written specifications of goods or services sought): The SFA will develop written specifications (solicitation) for each micro-purchase transaction. The solicitation document will include the written specifications for the goods and services to be purchased including Buy American Provision requirements when applicable, and any additional technical requirements that is required in order to conduct business with the SFA. No unreasonable requirements that may limit competition will be included in the specifications of the solicitation, such as requiring unnecessary experience, or the specification of a “brand name” without allowing an “equal to” product. Once developed, the solicitation is used to identify a responsible vendor for the goods or services to be procured.

The Director of School Nutrition Services is responsible for:

- Ensuring written specifications for each micro-purchase are developed (including the Buy American Provision when applicable) and any additional technical requirements for conducting business with the SFA.
- Ensuring that the specifications do not include any unnecessary requirements that may limit competition.

3. DETERMINE PRICE REASONABLENESS: Micro-purchases are awarded without soliciting competitive prices or rate quotations when the SFA considers the price from a responsible vendor to be reasonable based on market research, experience, purchase history, or other relevant information.

The Director of School Nutrition Services is responsible for:

- Determining prices from responsible vendors to be reasonable, based on market research, experience, purchase history, or other relevant information.

4. RECORDKEEPING: The SFA will ensure that the history of each micro-purchase procurement is adequately documented (2 CFR 200.318(i)).

The Director of School Nutrition Services is responsible for documentation of each micro-purchase transaction:

- ✓ Rationale/Justification for using micro-purchase method.
- ✓ Written specifications of the goods or services procured (i.e., a solicitation).
- ✓ Vendor Name and relevant contact information.
- ✓ Purchase date.
- ✓ Itemized receipt of purchase that includes what was purchase and the amount paid.
- ✓ The method used by the SFA used to determine that the price was reasonable.
- ✓ Receipts, invoices, and payment history.

**Small Purchase Procedures 2 CFR 200.320(a):**

Small purchase procedures may be used when goods or services have an aggregate total cost that is equal to or less than the SFAs small purchase threshold. When small purchase procedures are used, price or rate quotes must be obtained from an adequate number of qualified sources as determined by the SFA.

Small Purchase Procedures:

1. PLANNING: Identify the goods or services to be procured, ensure that it is necessary to be purchased for the program, and identify the anticipated cost of the procurement.

The Director of School Nutrition Services is responsible for:

- Planning for the procurement.
- Ensuring the amount of the procurement will not exceed the SFAs small purchase threshold.

2. DEVELOP A WRITTEN SOLICITATION: A written solicitation document will be developed for each small purchase procurement. The solicitation document will include the written specifications for the goods and services to be procured including the Buy American Provision requirements when applicable, any additional technical requirements that a vendor must be able to provide, such as delivery requirements, and any applicable information that may be relevant to the vendors response to the solicitation. The specifications and technical requirements will be written so that they allow for full and open competition. No unreasonable requirements will be used such as unnecessary experience requirements, or the specification of a “brand name” product without allowing “an equal to” product. Once developed, the solicitation document will be used to obtain 2 or more price quotes and/or pricing information as appropriate from responsible vendors.

3. OBTAIN PRICE QUOTES: Price quotes may be obtained orally, in writing, or from electronic sources. All prospective vendors will be provided the same solicitation information when obtaining price quotes. The responses of other vendors will not be shared with other prospective vendors until the purchase has been awarded.

The Director of School Nutrition Services is responsible for:

- Ensuring that solicitations are developed and include written specifications of the goods or services to be procured (including the Buy American Provision when applicable), any additional technical requirements for vendors, such as delivery requirements, and any applicable information relevant to the procurement that may affect a vendors response.
- Ensuring that the solicitation does not include any unnecessary requirements that may limit competition.

- Ensuring that solicitations are used to obtain price quotes and/or pricing information as appropriate from prospective vendors.
  - Ensuring that price quotes received are not shared with prospective vendors when obtaining price quotes.
  - Ensuring that an adequate number (2 or more) of price quotes are obtained from responsible vendors.
4. DETERMINE IF QUOTES ARE RESPONSIVE TO THE WRITTEN SOLICITATION: When making a small purchase award, it will first be determined if the goods or services of the price quotes received are responsive to the solicitation. When the goods or services offered do not meet all specifications and requirements in the solicitation, the price quote will be deemed non-responsive and will not be further considered for purchase award. When this occurs, additional quotes must be obtained if needed to ensure that the procurement remains a competitive process.

The Director of School Nutrition Services is responsible for:

- Ensuring that the goods or services from the price quotes received are determined to be responsive to the solicitation and eligible to be further evaluated for purchase award.
  - Determining if additional price quotes will be obtained to ensure the procurement remains a competitive process.
5. EVALUATE RESPONSIVE QUOTES FOR PURCHASE AWARD: Once it has been determined that 2 or more price quotes have been received from responsive and responsible vendors, the responses will be evaluated, and the purchase will be awarded based on the lowest price quote received.

The Director of School Nutrition Services is responsible for:

- Evaluating the price quotes that were deemed responsive to the solicitation and determining purchase award based on the lowest price quote received.
6. RECORDKEEPING: The SFA will ensure that the history of each small purchase procurement is adequately documented (2 CFR 200.318(i)).

The Director of School Nutrition Services is responsible for documentation of records:

- ✓ Solicitation document for the goods or services procured and used to obtain price quotes.
- ✓ All vendors contacted or attempted to be contacted, the date they were contacted or attempted to be contacted, and their corresponding contact information.
- ✓ Documentation of the price quotes received specific to the method in which they were obtained. Copies of any written price quotes received, documentation if provided orally, or an electronic image if from a website or other electronic avenue.
- ✓ The reason a price quote may be deemed unresponsive to the solicitation.
- ✓ The evaluation of responses to determine purchase award.
- ✓ Receipts, invoices, and payment history.

**Formal Procurement Methods 2 CFR 200.320(b):**

There are two formal procurement methods that may be used when procuring goods and services for the Child Nutrition Program:

1. Sealed Bids
2. Competitive Proposals

The SFA will utilize one of the formal procurement methods when the estimated cost of the goods and services to be procured will be above the small purchase threshold. Formal procurement methods may be utilized when purchases are estimated to be under the small purchase threshold if it is determined to be appropriate or more advantageous to do so.

**Sealed Bidding 2 CFR 200.320(b)(1):**

The Sealed Bidding procurement method is the preferred method to use when conducting a formal procurement where there is no substantive difference, other than price, of products or services that meet established specifications. A firm fixed price (lump sum or unit price) contract will be awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bid, is the lowest in price.

When determining if sealed bidding is feasible, the following conditions should be determined to be present:

- ✓ A complete, adequate, and realistic specification or purchase description is available;
- ✓ Two or more responsible bidders are willing and able to compete effectively for the business; and
- ✓ The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

Sealed Bidding Procedures:

1. **PLANNING:** Identify the goods or services to be procured, ensure that it is necessary to be purchased for the program, and identify the anticipated cost of the procurement.
2. **DEVELOP A SOLICITATION DOCUMENT:** An Invitation for Bid (IFB) is used when using the sealed bidding procurement method.

The IFB should include:

- Written specifications or description of the products or services needed.
- Terms and conditions of the contract.
- Any attachments or instructions needed for the bidder to properly respond.
- Identification of the type of contract to be awarded.
- The federal contract clauses and provisions as applicable.
- An explanation of how the contract will be evaluated for contract award (Line item, Total Cost, or Market Basket).
- If value-added language (broad language inviting incentives or investments) is included, stated criteria for how this will be evaluated, and a statement informing the bidder that the unallowable cost items will be excluded prior to the evaluation for contract award. Unallowable

cost items are any goods or services not required for the operation and improvement of the Child Nutrition Program (e.g., score boards).

- The time and date in which bids must be received.
- The time and date that bids will be opened and evaluated.
- Any other pertinent information relevant to enable the vendor to respond to the solicitation.

The SFA will ensure that specifications, terms, and conditions in the IFB will not unnecessarily limit competition by, but not limited to:

- Ensuring all specifications, terms and conditions are reasonable.
- Not requiring unnecessary experience.
- Not specifying “brand name” products. An “equal” product with performance or relevant requirements will always be allowed.
- Not using specifications developed by vendors.
- Any other arbitrary actions that may directly or indirectly limit competition.

The Director of School Nutrition Services is responsible for ensuring the Invitation for Bid solicitation document includes all necessary information and does not limit competition.

3. PUBLICLY ADVERTISE: The Invitation for Bid (IFB) will be publicly advertised for a length of time that provides sufficient time to solicit from an adequate number of qualified suppliers. IFBs will be advertised in the Newspaper/media, Website, other internet sources to publicize the intent of the SFA to purchase items or services. The advertisement for bids or legal notice will be run for 10 consecutive days. Additionally, known suppliers may be directly contacted and informed of the solicitation’s availability. Affirmative steps to include Minority Businesses, Women’s Business Enterprises, and Labor Surplus Firms will be utilized.

The announcement (advertisement or legal notice) will contain a general description of items or services to be purchased, the deadline for submission of sealed bids, and how solicitation documents may be obtained.

The Director of School Nutrition Services is responsible for ensuring the IFB is publicly advertised for an adequate length of time in order to solicit from an adequate number of suppliers.

If any potential vendor has questions concerning the specifications or purchase conditions, an interpretation will be provided by The Director of School Nutrition Services.

4. BID OPENING: The IFB will be opened at the time and date described in the solicitation. Details of the bid opening will be adequately documented to demonstrate that procedures were properly followed.

The Director of School Nutrition Services is responsible for ensuring that the bid opening process is adequately documented including the day, time, and attendees.

5. EVALUATION AND CONTRACT AWARD: All bids that are received by the stated deadline will be opened for consideration. No contracts will be awarded to bidders that developed the specifications or descriptions for the procurement. Any bids that are rejected will have a documented sound reason for doing so.

Bids will only be deemed responsive to the solicitation when all specifications, terms, and conditions (including buy american requirements when applicable) are met. When bids are deemed non-responsive to the solicitation, the reason they have been deemed non-responsive will be identified and documented.

When a response includes an offer of goods or services that is beyond what was solicited, the overly responsive offer will either be eliminated from consideration, or the portion deemed to be overly responsive will not be considered when evaluating for contract award.

All bids deemed responsive to the solicitation will be evaluated as described in the solicitation for contract award. A fixed price contract will be awarded to the responsible bidder(s) with the lowest price bid.

One of the following methods will be used to evaluate the lowest price bid for contract award:

- Bottom Line or Total Cost Analysis: The prices and anticipated quantities are totaled for all items being procured. The lowest total priced bid from a responsive vendor is selected for the award.
- Line-Item Analysis: Each item listed on the bid is individually awarded to the lowest bidder.
- Market Basket Analysis: A representative sample that reflects 75% or more of the estimated contract value (estimate cost of items and expected quantities needed) is evaluated for contract award. The lowest bid from a responsive vendor is awarded the contract. Although not evaluated for contract award, the bidder must provide pricing for all items bid which then becomes the contracted price for those items. Goods may be added to the contract after contract award if that option was allowed in the solicitation, as long as the total value of all additional goods does not exceed the amount specified in the contract, and added goods are included in a contract amendment.

The Director of School Nutrition Services is responsible for ensuring that bid openings, acceptance or rejections, evaluations and contract award are made in compliance with requirements.

6. RECORDKEEPING:

The Director of School Nutrition Services is responsible for documentation of records ensuring that the history of Competitive Sealed Bidding Procurements are adequately documented (2 CFR 200.318(i)).

The following documents will be maintained:

- ✓ Rationale for the procurement method used.
- ✓ The independent cost estimate of goods or services determined prior to advertising the IFB with documentation of the market research conducted (if any).
- ✓ A copy of the Invitation for Bid and any amendments that were published.
- ✓ Documentation evidencing advertisement of the procurement.
- ✓ Documentation concerning the pre- bid or proposal conference (if applicable) and/or any solicitation Questions and Answers.
- ✓ Signed acknowledgement of any solicitation amendments.
- ✓ Documentation concerning any "No Bid" letters or correspondence and the disqualification of bidders ("nonresponsive").



- ✓ Public Bid Opening documentation.
- ✓ Documentation of the evaluation of bid responses for contract award.
- ✓ Documentation of the Cost or Price Analysis conducted to determine that prices are “fair and reasonable”.
- ✓ Protest letters, decisions, or other related documents.
- ✓ A copy of the signed and executed contract.
- ✓ Contract modifications and documents supporting such modifications.
- ✓ Documentation related to any option exercised including related contract modifications.
- ✓ Vendor-submitted data and reports.
- ✓ Correspondence/documentation related to complaints or vendor performance.
- ✓ Invoices and Payment Vouchers.
- ✓ Contact administration correspondence between the SFA and the Vendor.
- ✓ Correspondence/documents concerning contract close-out.

**Competitive Proposal 2 CFR 200.320(2):**

The Competitive Proposal procurement method is generally used when the products or services are more complex and factors in addition to cost are considered when making an analysis to award the contract. All factors that are considered, including price, have a written method for evaluating the proposals received and making selections for contract award. Negotiations may or may not be utilized. A fixed price or a cost-reimbursable contract may be awarded.

1. PLANNING: Identify the goods or services to be procured, ensure that it is necessary to be purchased for the program, and identify the anticipated cost of the procurement.
2. DEVELOP A SOLICITATION: A Request for Proposal (RFP) solicitation will be used when using competitive proposal procedures.

The RFP will include:

- Written specifications or description of the products or services needed.
- Terms and conditions of the contract.
- Any attachments or instructions needed for the bidder to properly respond.
- Identification of the type of contract to be awarded.
- The federal contract clauses and provisions as applicable.
- The information respondents must provide in their proposals to accomplish what is requested.
- The criteria that will be used to evaluate for contract award and an explanation on how the criteria will be weighted and scored.
- If value-added language (broad language inviting incentives or investments) is included, the RFP will include the criteria for how this will be evaluated, and a statement informing bidders that unallowable cost items will be excluded prior to the evaluation for contract award. Unallowable cost items are any goods or services not required for the operation and improvement of the child nutrition program (e.g., score boards).

- The time and date in which proposals must be received.
- Any other pertinent information needed to enable the vendor to respond to the solicitation.

The SFA will ensure that the specifications, terms, criteria for evaluation and the conditions in the RFP will not unnecessarily limit competition by, but not limited to:

- Ensuring all specifications, terms and conditions are reasonable.
- Not requiring unnecessary experience.
- Not specifying "brand name" products. An "equal" product with performance or relevant requirements will always be allowed.
- Not using specifications developed by vendors.
- Not using arbitrary actions that may directly or indirectly limit competition.
- The criteria to be scored in proposals will be clearly identified and will be both objective and measurable.
- The criteria to be scored will include price and other criteria such as product specifications, service and deliveries, geographic preferences for local products, and overall qualifications. Price will have the highest weight of the criteria used.
- How each criteria will be scored is clearly described in solicitation documents.

The Director of School Nutrition Services is responsible for ensuring the Request for Proposal solicitation document includes all necessary information and does not limit competition.

3. PUBLICLY ADVERTISE: The Request for Proposal (RFP) will be publicly advertised for a length of time that provides sufficient time to solicit from an adequate number of qualified vendors. RFPs will be advertised **on the district's website, in the local newspaper, and other internet sources** to publicize the intent of the Child Nutrition Program to purchase needed items or services. The advertisement for proposals or legal notice will be run for **10 consecutive days**. Additionally, known suppliers may be directly contacted and informed of the solicitation's availability. Affirmative steps to include Minority Businesses, Women's Business Enterprises, and Labor Surplus Firms will be utilized. The announcement (advertisement or legal notice) will contain a general description of items to be purchased, the deadline for submission of proposals and the address where complete specifications and other procurement documents may be obtained.

The Director of School Nutrition Services is responsible for ensuring the Request for Proposal solicitation is publicly advertised for an adequate length of time in order to solicit from an adequate number of suppliers.

If any potential vendor has questions concerning the specifications or purchase conditions, an interpretation will be provided by the Director of School Nutrition Services.

4. EVALUATION AND CONTRACT AWARD: RFPs will be accepted, evaluated, and awarded a fixed price or cost-reimbursable contract as described in the solicitation. Any proposals that are rejected will have a documented sound reason for doing so. No contracts will be awarded to bidders that developed the specifications or descriptions for the procurement. When a response includes an offer of goods or services that is beyond what was solicited, the overly responsive proposal will either be eliminated from consideration, or the portion deemed to be overly responsive will not be considered when evaluating for contract award.

Methods that may be used to evaluate proposals for contract award:

- **Two-Step Negotiation:** The technical aspects of the proposals are solicited, evaluated and ranked before cost is considered. Once the top-ranked proposals are identified, the SFA will enter into negotiations with these vendors. Negotiations are directed at obtaining equivalent, not necessarily equal technical proposals from each vendor. Once equivalent proposals are obtained, vendors are instructed to submit their best and final prices. The contract award will be made to the vendor who submitted the lowest price for their proposal as all of the negotiated proposals were previously deemed acceptable.
- **If Two-Step Negotiation not utilized:** Evaluate both the cost and technical components of the proposal and rank responses as scored. If desired, the SFA may negotiate both the costs proposed, and services and/or items proposed with the responding vendors. The contract award is made to the vendor presenting the most advantageous proposal, with price used as the primary factor.

The Director of School Nutrition Services is responsible for ensuring that proposals are accepted, evaluated and awarded in compliance with requirements.

#### 5. RECORDKEEPING:

The Director of School Nutrition Services is responsible for documentation of records ensuring that the history of Competitive Proposal Procurements are adequately documented (2 CFR 200.318(i)).

The following documents will be maintained:

- ✓ Rationale for the procurement method used.
- ✓ The independent cost estimate of goods or services determined prior to advertising the RFP with documentation of the market research conducted (if any).
- ✓ A copy of the Request for Proposal and any amendments that were published.
- ✓ Documentation evidencing advertisement of the procurement.
- ✓ Documentation concerning the proposal conference (if applicable) and/or any solicitation Questions and Answers.
- ✓ Documentation concerning any "No Bid" letters or correspondence and the disqualification of bidders ("nonresponsive").
- ✓ Documentation of the results of technical evaluations, individual evaluator scoring sheets and narratives, and consensus scoring sheet and narratives.
- ✓ Documentation of negotiations, if conducted, and subsequent submittal of "best and final offer" proposals
- ✓ All documentation of the Cost or Price Analysis conducted to determine prices are "fair and reasonable".
- ✓ Protest letters, decisions, or other related documents.
- ✓ A copy of the signed and executed contract.
- ✓ Contract modifications and documents supporting such modifications.
- ✓ Documentation related to any option exercised including related contract modifications.
- ✓ Vendor-submitted data and reports.

- ✓ Correspondence/documentation related to complaints or vendor performance.
- ✓ Invoices and Payment Vouchers.
- ✓ Contact administration correspondence between the SFA and the Vendor.
- ✓ Correspondence/documents concerning contract close-out.

**Noncompetitive Procurement Procedures 2 CFR 200.320(c):**

There are specific circumstances in which noncompetitive procurement may be used. Noncompetitive procurement will only be conducted if one or more of the following circumstances apply:

- 1) The aggregate dollar amount of the goods or services needed does not exceed the micro-purchase threshold. (Micro-purchase procedures will be followed.)
- 2) The item is available only from a single source.
- 3) The public exigency or emergency for the purchase will not permit waiting for the time required to publicize and award a competitive solicitation.
- 4) School and Community Nutrition expressly authorizes a noncompetitive procurement in response to a written request.
- 5) After solicitation of a number of sources, competition is determined inadequate. (i.e. only 1 response received to a competitive solicitation, or no responses received were fully responsive to a competitive solicitation).

**Inadequate Competition and Sole Source:**

In accordance with 2 CFR 200.324(b) the SFA will negotiate profit as a separate element of the price for each contract in which there is no price competition (sole source or only one response to the solicitation received). To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the vendor, the vendors investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

When inadequate responses are received from a solicitation, the SFA will evaluate if the lack of responses may be due to a poorly written solicitation or if the written specifications and technical requirements established are too restrictive. The SFA will also evaluate the solicitation to determine what changes may be needed to have a competitive procurement process in the future.

The Director of School Nutrition Services is responsible for negotiating profit as a separate element of the price for each contract in which there is no price competition. (sole source or only one response to solicitation received)

The Director of School Nutrition Services is responsible for evaluating if the lack of responses may be due to a poorly written solicitation or if the written specifications and technical requirements established are too restrictive.

**Public Exigency or Emergency:**

Lack of planning is not considered an emergency and will not justify conducting noncompetitive purchasing. Even when a public emergency is enacted, the individual circumstance of the SFA is still the determining factor if noncompetitive procedures can be used.

When noncompetitive procurement is necessary due to an emergency, the Director of School Nutrition Services is responsible for ensuring they are necessary, allowable, and that prior approval is obtained from KDE.

Procedures to obtain prior approval from KDE:

1. Submit requests via email to: Lauren Moore, Director, Division of School and Community Nutrition  
[Lauren.moore2@education.ky.gov](mailto:Lauren.moore2@education.ky.gov).
2. Requests should include:
  - a. A signed statement by the Superintendent describing the emergency that exists which will cause public/program harm as a result of the delay in the use of a competitive procurement method.
  - b. The estimated cost of the goods and/or services.

**Recordkeeping:**

Whenever noncompetitive procurement procedures are used, the SFA will ensure that the history of each noncompetitive procurement is adequately documented (2 CFR 200.318(i)).

The Director of School Nutrition Services is responsible for documentation of records as applicable:

- ✓ Items or services procured.
- ✓ Contract type and length.
- ✓ Vendors contacted, and vendor awarded.
- ✓ Statement signed by the Superintendent and the reason for emergency or pressing need.
- ✓ KDE approval.
- ✓ Billing and payment history.
- ✓ Documentation of the evaluation conducted to determine that competition was not restricted when inadequate responses are received.
- ✓ Sole source documentation.
- ✓ Cost analysis when required and negotiation with vendor for better terms and prices.

Any contracts that result from noncompetitive procurements conducted due to an emergency or inadequate competition will be limited in duration until competitive procurement can be conducted.

**Section D: Minority Businesses, Women's Business Enterprises, and Labor Surplus Firms (2 CFR 200.321):**

SFAs must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible.

The following affirmative steps must be taken:

- 1) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;
- 2) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;
- 3) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;
- 4) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;
- 5) Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and
- 6) Requiring third party entities and procurement agents who may procure on behalf of the SFA to take the same affirmative steps in the procurement process.

## **Section E: Domestic Preference for Procurements 2 CFR 200.322:**

The SFA should, to the greatest extent practicable, provide a preference for the purchase and use of domestic goods. The USDA program regulations in 7 CFR 210.21(d), and 7 CFR 220.16(d) identify the Buy American Provision Requirements that are applicable to SFAs participating in the NSLP and SBP.

SFAs are required to purchase, to the maximum extent practicable, domestic agricultural commodities or products. There are limited exceptions to the Buy American provision which allow for the purchase of foods not meeting the "domestic" standard.

The National School Lunch Act defines "domestic commodity or product" as an agricultural commodity that is produced in the U.S. and its territories (Guam, American Samoa, Virgin Islands, Puerto Rico, and the Northern Mariana Islands), and a food product that is processed in the U.S. substantially using agricultural commodities produced in the U.S. and its territories (Guam, American Samoa, Virgin Islands, Puerto Rico, and the Northern Mariana Islands). This means that all unprocessed foods must be domestic, and all processed foods must be processed domestically using at least 51% domestically grown items, by weight or volume.

### **Implementing the Buy American Provision:**

FNS defines a food component as one of the components comprising a reimbursable meal. The food components are: meats/meat alternates, grains, vegetables, fruits, and fluid milk (refer to 7 CFR 210.2 for full definitions). Any procurement of food products in which funds will be used from the nonprofit food service account to purchase must comply with the Buy American provision.

To ensure compliance with the Buy American provision the SFA must include solicitation and contract language identifying the requirement for domestic agricultural commodities and products. The SFAs should ask suppliers for specific information about the percentage of U.S. content in any processed end products.

The Director of School Nutrition Services is responsible for ensuring that the requirement to comply with Buy American Provision is included when applicable in all procurement methods utilized.

### **Exception Request Approvals:**

There are limited exceptions to the Buy American provision which allow for the purchase of foods not meeting the "domestic" standard as described above (i.e., "non-domestic") in circumstances when use of domestic foods is truly not practicable. These exceptions, as determined by the SFA, are:

- The product is not produced or manufactured in the U.S. in sufficient and reasonably available quantities of a satisfactory quality; or
- Competitive bids reveal the costs of a U.S. product are significantly higher than the non-domestic product.

Before approving an exception request, alternatives to purchasing a non-domestic product will be considered.

When exceptions are granted the following documentation will be maintained as applicable:

#### Exception granted for unavailability:

- ✓ Communication(s) from vendor indicating that the product is not produced or manufactured in sufficient and reasonable quantities or quality in the U.S.
- ✓ Alternatives that the SFA considered prior to approving an exception. (e.g. substitute domestic pears for non-domestic bananas may have been considered).

- ✓ The reason(s) why the SFA decided to grant the exception to substitute a non-domestic product for a domestic one.

Exception granted for a significant cost difference:

- ✓ Communication(s) from the vendor indicating that there is a significant cost difference between a domestic and non-domestic product. (Can be emails, documentation of telephone communications, etc.)
- ✓ The cost of the domestic and non-domestic product compared.
- ✓ Alternatives that the SFA considered prior to approving an exception.
- ✓ The reason(s) why the SFA decided to grant the exception to substitute a non-domestic product for a domestic one.

The Director of School Nutrition Services is responsible for receiving exception requests from vendors, reviewing the request to see if it is for an allowable exception, determine if an exception request from vendors will be approved, and ensures all actions are adequately documented.

**Monitoring of Buy American Requirements:**

In order to ensure that contractors perform in accordance with contracts or purchase orders, the SFA will review products and delivery invoices or receipts to ensure the domestic food that was solicited and awarded is the food that is received. In addition, a periodic review of storage facilities, freezers, refrigerators, dry storage, and warehouses will be conducted in order to ensure the products received are the ones solicited, and awarded, in compliance with the Buy American provision.

Procedure to monitor when deliveries are received:

1. Product labels and packaging are inspected to identify non-domestic food products when food deliveries are received.
2. If any products are substituted in the delivery, the product packaging and labels will be inspected to ensure they are in compliance with Buy American. If the country of origin information is not identified, the vendor will be contacted to obtain the country of origin or a certification of the % of U.S. content.
3. When non-domestic **USDA or DOD food products** are delivered:
  - a) The product will be rejected.
  - b) The Kentucky Department of Agriculture (KDA) will be contacted immediately.
  - c) All of the shipping and receiving information for the product will be provided to KDA.
  - d) A complaint will be logged in the WBSCM.
4. When **non-USDA or DOD foods**, the process for addressing vendor non-compliance will be implemented when the unapproved non-domestic products are delivered.

Procedures to periodically monitor food storage areas:

1. All storage areas are monitored regularly to identify any nondomestic products.
2. When **non-domestic USDA or DOD food products** are found in storage:
  - a) The Kentucky Department of Agriculture (KDA) will be contacted immediately.
  - b) All of the shipping and receiving information for the product will be provided to KDA.



- c) A complaint will be logged in the WBSCM.
- 3. When **non-USDA or DOD foods**, the process for addressing vendor non-compliance will be implemented when the unapproved non-domestic products are identified.

Procedures to address vendor non-compliance:

1. When unapproved non-domestic products are identified:
  - a) If found during delivery, the product will be rejected if meal production schedules will allow for a delay in receiving a replacement product.
  - b) If found while monitoring storage areas, the product will be pulled from storage and/or indicated that the product should not be used.
2. The vendor will be notified that an unapproved non-domestic product was received and that it must be replaced with a domestic product. If the vendor indicates that a domestic product cannot be provided for a reason that could be an allowable exception, the vendor will be instructed to provide adequate documentation to support the request for an allowable exception and will be reminded that exceptions must be approved prior to delivery.
3. The incidence of the vendor's contractual non-compliance with the Buy American Provision will be documented and maintained on file.
4. The SFA will utilize the specific Remedies for Breach of Contract as described in the contract clause for incidences of noncompliance with the contract requirements.
5. The SFA will utilize the Termination clause in the awarded contract once the criteria for termination for non-compliance with contractual requirements have been reached.
6. The vendor's non-compliance record will be considered when evaluating whether or not they are considered a responsible bidder to future procurement solicitations.

The Director of School Nutrition Services is responsible for ensuring that the SFA conducts monitoring for compliance of the Buy American Provision when receiving deliveries, conducting a periodic review of storage facilities, freezers, refrigerators, dry storage, and warehouses, and addressing vendor non-compliance when found.

**Section F: Procurement of Recovered Materials 2 CR 200.323:**

A non-Federal entity that is a state agency or agency of a political subdivision of a state and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired during the preceding fiscal year exceeded \$10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

### **Section G: Cost and/or Price Analysis 2 CFR 200.324:**

The SFA must perform a cost or price analysis in connection with every procurement action in excess of their small purchase threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the SFA must make independent cost estimates before receiving bids or proposals.

The SFA must negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

Costs or prices based on estimated costs for contracts are allowable only to the extent that costs incurred or cost estimates included in negotiated prices are not an allowable cost to the nonprofit foodservice account per the federal cost principles found in 2 CFR 200 Subpart E.

**PROCEDURES:** In order to ensure that the prices that are paid out of federal funds are fair and reasonable, a cost or price analysis must be conducted when using formal procurement methods and prior to implementing contract amendments. This analysis begins with identifying independent cost estimates of the anticipated procurement prior to issuing solicitations and prior to implementing contract amendments.

A cost or a price analysis may be conducted singularly, or in combination with one another to ensure that prices are fair and reasonable.

A price analysis is conducted when procurements lend themselves to a simple comparison of proposed prices and an independent price estimate.

A cost analysis is conducted:

- When a response or price quote received is significantly lower compared to all other prices quotes received (best practice - 15% or greater difference is suggested).
- If it is unable to be determined that the proposed costs are fair and reasonable after conducting a price analysis.
- Whenever a price analysis is insufficient to determine reasonableness due to what is being procured.
- There was inadequate competition in response to the solicitation.

To conduct a Price Analysis:

The bid prices received are compared to the independent cost estimated identified. When prices offered are within the realm of what was expected, it will be determined that the proposed prices are fair and reasonable.

To conduct a Cost Analysis:

Each individual element of cost that makes up the total price in the vendors response are evaluated. The evaluation can include elements such as labor, administrative costs, lifecycle costs, Buy American factors, multi-year prices, the profit for the vendor, etc. The individual cost elements will be compared to independent cost estimates, or against the other responses received as is appropriate in order to determine if the prices are fair and reasonable.

The Director of School Nutrition Services is responsible for conducting a cost and/or price analysis when formal procurement methods are used and prior to implementing contract amendments.

#### **Section H: FNS or SCN Review of Records 2 CFR 200.325:**

The SFA will make available, upon request of the USDA Food and Nutrition Services (FNS) or School and Community Nutrition (SCN) the technical specifications on proposed procurements where FNS or SCN believes such review is needed to ensure that the item or service specified is the one being proposed for acquisition. If conducted, this review will take place prior to the time the specification is incorporated into a solicitation document. However, if the SFA desires to have the review accomplished after a solicitation has been developed, FNS or SCN may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

The SFA will make available upon request, to FNS or SCN pre-procurement review, procurement documents, such as requests for proposals or invitations for bids, or independent cost estimates, when:

1. The SFAs procurement procedures or operation fails to comply with the federal procurement standards;
2. The procurement is expected to exceed their small purchase threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation;
3. The procurement, which is expected to exceed their small purchase threshold, specifies a "brand name" product;
4. The proposed contract is more than their small purchase threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or
5. A proposed contract modification changes the scope of a contract or increases the contract amount by more than their small purchase threshold.

### **Section I: Bonding Requirements 2 CFR 200.326:**

When child nutrition funds are used to pay for procurements from a construction or facility improvement contract or subcontract exceeding the small purchase threshold, the SFA must ensure that the federal programs interest is adequately protected. Unless previously determined by FNS or SCN that this is the case, the minimum requirements must be as follows:

- a. A bid guarantee from each bidder equivalent to five percent of the bid price. The "bid guarantee" must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.
- b. A payment bond on the part of the contractor for 100 percent of the contract price. A "payment bond" is one executed in connection with a contract to secure fulfillment of all the contractor's requirements under such contract.
- c. A payment bond on the part of the contractor for 100 percent of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

**Section J: Solicitation and Contract Clauses and Provisions 2 CFR 200.327:**

Contracts used by SFAs are required to contain the clauses and provisions set forth in the Federal Uniform Requirements, Cost Principles, and Audit Requirements for Federal Awards 2 C.F.R. Pt. 200, App. II., as applicable. Contracts must also conform to the program specific regulatory requirements set forth in 7 CFR 210, 7 CFR 220, and 2 CFR 250 as applicable.

SFAs must determine which of the following clauses and provisions are applicable to a particular procurement and include them in the solicitation and contract documents when required. When federal funds will be used to pay for purchases made from an awarded contract, all of the federally required contract clauses and provisions must be included. This requirement applies whether the SFA is conducting their own procurement, or when using contracts that are procured by the district, co-operative groups, and third-party entities.

The tables below provide a summary of the required clauses or provisions identified in 2 CFR 200 Appendix II, and in the program regulations 7 CFR 210, 7 CFR 220, and 2 CFR 250. Additional clauses and provisions may be required or beneficial depending on what good or service is being procured. A full description of the clauses and provisions, suggested or required language, required form links, and other requirements can be found in **Appendix A of this document**. SFAs must use the required language and forms when indicated. The suggested language may be used to assist SFAs when they are writing their own clauses and provisions to include in their procurement documents.

<b>2 CFR 200 Appendix II Required Clauses and Provisions Summary</b>			
	<b>Required Provision</b>	<b>Contract Criteria</b>	<b>Suggested or Required Language, Information, or Form?</b>
1	Remedies for breach of contract	> Small Purchase Threshold	No. – Must be based on SFA specific procedures.
2	Termination for cause or convenience	> \$10k	Yes – <b>Suggested</b> language
3	Equal Employment Opportunity	Construction, alteration, and/or repairs (including painting and decorating)	Yes – <b>Required</b> Language
4	Davis Bacon Act	Construction, alteration, and/or repairs (including painting and decorating)	Yes – <b>Suggested</b> Language
5	Copeland Anti-Kickback Act	Construction, alteration, and/or repairs (including painting and decorating) > \$2k	Yes – <b>Suggested</b> Language
6	Contract Work Hours and Safety Standards Act	> \$100k + mechanics or laborers	Yes. <b>Suggested</b> language based on requirements in 29 CFR 5.5(b)
7	Rights to inventions made under a contract or agreement	Funding agreements	Yes – <b>Suggested</b> Language
8	Clean Air Act and Federal Water Pollution Control Act	>\$150k	Yes – <b>Suggested</b> Language

9	Debarment and Suspension	All	Yes - <b>Suggested</b> Language if clause used, and a <b>Required</b> form if certification used
10	Byrd Anti-Lobbying Amendment	>\$100k: Certification	Yes - <b>Suggested</b> Language, and <b>Required</b> form that must be used
11	Procurement of Recovered Materials	SFA is a state or political subdivision of a state. Work involves the use of materials.	No.
12	Prohibition on certain telecommunications and surveillance services or equipment.	Telecommunications and Surveillance equipment or systems	Yes – <b>Suggested</b> Language
13	Domestic Preference for Procurements	Agriculture commodities crediting to the meal pattern (dairy, bread, meat, fruit, and vegetables).	Yes – <b>Suggested</b> Language. See Buy American in the Program Specific Provisions section.

<b>Federal Program Required Clauses and Provisions Summary</b>			
	<b>Required Provision</b>	<b>Contract Criteria</b>	<b>Suggested or Required Language, Information, or Form?</b>
14	Buy American	Agriculture commodities crediting to the meal pattern (dairy, bread, meat, fruit, and vegetables).	Yes – <b>Suggested</b> Language
15	Cost-Reimbursable Contracts	All cost-reimbursable contracts	Yes – <b>Required</b> Information from 7 CFR 210.21(f)
16	Geographic Preference	Local unprocessed agricultural commodities.	No.
17	Processing USDA Commodity Foods	All agreements or contracts for Processing USDA Commodity Foods	Yes – <b>Required</b> Information from 2 CFR 250.31(b)
18	Procurement Agent Practices	All Procurement Agent contracts.	Yes – <b>Required</b> Language

### **Section K: Prior Written Approval 2 CFR 200.407:**

While not a procurement policy, there are federal financial management regulations that require some purchases to be pre-approved by SCN before the procurement process is conducted in order to be an allowable cost to the non-profit foodservice account.

#### **Equipment Purchases 2 CFR 200.439(b)(2):**

Equipment purchases are allowable as a direct cost to the Child Nutrition Program, if items with a unit cost of \$5,000 or more (or less if the SFA has a lower capital threshold established) has the prior written approval from the Division of School and Community Nutrition.

2 CFR 200.33 defines “equipment” as tangible personal property (including information technology systems) having a useful life of one year or longer and a per-unit acquisition cost that equals or exceeds the lesser of the capitalization threshold established by the SFA for financial statement purposes, or \$5,000.

SFA Capitalization Threshold: **\$5,000.00**

The USDA allows state agencies to establish a list of equipment that SFAs may purchase without submitting a request for prior approval (USDA memo SP 39-2016; SFSP 13-2016; CACFP 11-2016). If the amount of purchase for equipment is greater than the applicable capitalization threshold, the following procedure is used:

1. The SFA will identify if the desired equipment is identified on the SCN approved equipment list.
  - If the equipment is listed, the appropriate procurement method will be determined, and the applicable procedures followed to procure the equipment.
2. If the equipment desired is not on the approved list, the SCN Prior Approval Equipment Request form will be completed and submitted to SCN for approval.

#### **Reconversion Costs 2 CFR 200.462:**

Facility alteration costs incurred for the maintenance and/or updates to facilities that will be charged to the Child Nutrition Program are allowable as a direct cost when written prior approval has been obtained from SCN.



**APPENDIX A: CLAUSES AND PROVISIONS FROM 2 CFR 200 APPENDIX II,  
AND PROGRAM REGULATIONS 7 CFR 210, 7 CFR 220, AND 2 CFR 250:**

**1. ADMINISTRATIVE/CONTRACTUAL/LEGAL REMEDIES:**

**Description:** Contracts for more than the simplified acquisition threshold, currently set at \$250,000, must include a clause that addresses administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.

**No suggested or Required language.** The language used should be reflective of the SFAs actual procedures that will be followed.

**2. TERMINATION FOR CAUSE OR CONVENIENCE:**

**Description:** Contracts in excess of \$10,000 must include a clause that addresses termination for cause and for convenience by the school district including the manner by which it will be effected and the basis for settlement.

**Suggested Language:**

- Termination for Cause: "The SFA may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the SFA, upon request, with adequate assurances of future performance. The SFA shall provide the Contractor with a written notice thirty (30) days prior to the contract termination date. In the event of termination for cause, the SFA shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the SFA for any and all rights and remedies provided by law. If it is determined that the SFA improperly terminated this contract for default, such termination shall be deemed a termination for convenience. The Contractor may also terminate this contract under the same set of aforementioned conditions."

Termination for Convenience: "The SFA may terminate this contract for any reason, provided that the SFA shall be required to provide the Contractor with a prior sixty (60) days' written notice of the effective date of such termination (Include the "Termination for Convenience Date"). The Contractor may also terminate this contract under the same set of aforementioned conditions."

**3. EQUAL EMPLOYMENT OPPORTUNITY:**

**Description:** This clause is required in contracts for construction, alteration, and/or repairs (including painting and decorating), of a public building or public work that meet the definition of "federally assisted construction contract" in 41 CFR 60-1.4(b), in accordance with Executive Order 11246, "Equal Employment Opportunity" (30 FR 12319, 12935, 3 CFR Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and implementing regulations at 41 CFR part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor."

Provisional language is provided in 41 CFR Part 60-1.4(b) for use in federally assisted construction contracts. The inclusion of the following language is required when the procurement activity is not exempt from the requirements of the equal opportunity clause:

**Required Language:**

- "The applicant hereby agrees that it will incorporate or cause to be incorporated into any contract for construction work, or modification thereof, as defined in the regulations of the Secretary of Labor at 41 CFR Chapter 60, which is paid for in whole or in part with funds obtained from the Federal

Government or borrowed on the credit of the Federal Government pursuant to a grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the following equal opportunity clause:

During the performance of this contract, the contractor agrees as follows:

The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin.

Such action shall include, but not be limited to the following:

Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.

(3) The contractor will not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This provision shall not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the contractor's legal duty to furnish information.

(4) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(5) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(6) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to their books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(7) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with

procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(8) The contractor will include the portion of the sentence immediately preceding paragraph (1) and the provisions of paragraphs (1) through (8) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor.

The contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance:

Provided, however, that in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the administering agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

The applicant further agrees that it will be bound by the above equal opportunity clause with respect to its own employment practices when it participates in federally assisted construction work: Provided, that if the applicant so participating is a State or local government, the above equal opportunity clause is not applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract.

The applicant agrees that it will assist and cooperate actively with the administering agency and the Secretary of Labor in obtaining the compliance of contractors and sub-contractors with the equal opportunity clause and the rules, regulations, and relevant orders of the Secretary of Labor, that it will furnish the administering agency and the Secretary of Labor such information as they may require for the supervision of such compliance, and that it will otherwise assist the administering agency in the discharge of the agency's primary responsibility for securing compliance.

The applicant further agrees that it will refrain from entering into any contract or contract modification subject to Executive Order 11246 of September 24, 1965, with a contractor debarred from, or who has not demonstrated eligibility for, Government contracts and federally assisted construction contracts pursuant to the Executive Order and will carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon contractors and sub-contractors by the administering agency or the Secretary of Labor pursuant to Part II, Subpart D of the Executive Order. In addition, the applicant agrees that if it fails or refuses to comply with these undertakings, the administering agency may take any or all of the following actions: Cancel, terminate, or suspend in whole or in part this grant (contract, loan, insurance, guarantee); refrain from extending any further assistance to the applicant under the program with respect to which the failure or refund occurred until satisfactory assurance of future compliance has been received from such applicant; and refer the case to the Department of Justice for appropriate legal proceedings."

#### **4. DAVIS-BACON ACT:**

**Description:** This provision is applicable to and must be included in contracts valued at \$2,000 or more for construction, alteration, and/or repairs (including painting and decorating, of a public building or public work). In accordance with the statute, contractors must be required to pay wages to workers at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, contractors must be required to pay wages not less than once a week. The SFA must place a copy of the current prevailing wage determination issued by the

Department of Labor in each solicitation. The decision to award a contract or subcontract must be conditioned upon the acceptance of the wage determination. The SFA must report all suspected or reported violations to the Federal awarding agency.

**Suggested Language:**

- “The successful bidder will be required to conform to the wage requirements prescribed by the federal Davis-Bacon and Related Acts which requires that all laborers and mechanics employed by contractors and subcontractors performing on contracts funded in whole or in part with federal funds in excess of \$2,000 pay their laborers and mechanics not less than the prevailing wage rates and fringe benefits, as determined by the Secretary of Labor, for corresponding classes of laborers and mechanics employed on similar projects in the area.”

**5. COPELAND “ANTI-KICKBACK” ACT:**

**Description:** In addition to the Davis-Bacon Act, the Copeland “Anti-Kickback” Act is applicable to contracts valued at \$2,000 or more for construction, alteration, and/or repairs (including painting and decorating, of a public building or public work). Compliance is required with the Copeland “Anti-Kickback” Act (40 U.S.C. 3145), as supplemented by Department of Labor regulations (29 CFR Part 3, “Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States”). The Act provides that each contractor or subrecipient must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. The SFA must report all suspected or reported violations to the Federal awarding agency.

**Suggested Language:**

- “Contractor shall comply with 18 U.S.C. § 874, 40 U.S.C. § 3145, and the requirements of 29 C.F.R. pt. 3 as may be applicable, which are incorporated by reference into the contract. The contractor or subcontractor shall insert in any subcontracts the clause above and such other clauses as appropriate agency instructions require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all of these contract clauses. A breach of the contract clauses above may be grounds for termination of the Contract, and for debarment as a contractor and subcontractor as provided in 29 C.F.R. § 5.12.”

**6. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT:**

**Description:** This clause is required for contracts in excess of \$100,000 that involve the employment of mechanics or laborers. Contracts must be in compliance with 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR Part 5). Under 40 U.S.C. 3702 of the Act, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of 40 U.S.C. 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

**Suggested Language from 29 C.F.R. § 5.5(b):**

- “Compliance with the Contract Work Hours and Safety Standards Act. (1) Overtime requirements. No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek. U. S. Department of Homeland Security Headquarters 500 C St SW Washington, D.C. 20042 Page 14 of 25 [www.fema.gov/procurement-disaster-assistance-team](http://www.fema.gov/procurement-disaster-assistance-team) To Table of Contents
- (2) Violation; liability for unpaid wages; liquidated damages. In the event of any violation of the clause set forth in paragraph (b)(1) of this section the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (b)(1) of this section, in the sum of \$27 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (b)(1) of this section.
- (3) Withholding for unpaid wages and liquidated damages. The (write in the name of the Federal agency or the loan or grant recipient) shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (b)(2) of this section.
- (4) Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clauses set forth in paragraph (b)(1) through (4) of this section and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs (b)(1) through (4) of this section.”

**7. RIGHTS TO INVENTIONS MADE UNDER A CONTRACT OR AGREEMENT:**

**Description:** This clause is required when the award meets the definition of “funding agreement” under 37 CFR 401.2 (a) and the school food authority wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that “funding agreement,” the recipient or sub recipient must comply with the requirements of 37 CFR Part 401, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements,” and any implementing regulations issued by the awarding agency.

The regulation at 37 C.F.R. § 401.2(a) defines “funding agreement” as any contract, grant, or cooperative agreement entered into between any Federal agency, other than the Tennessee Valley Authority, and any contractor for the performance of experimental, developmental, or research work

funded in whole or in part by the Federal government. This term also includes any assignment, substitution of parties, or subcontract of any type entered into for the performance of experimental, developmental, or research work under a funding agreement as defined in the first sentence of this paragraph.

**No suggested or required language.**

**8. THE CLEAN AIR ACT AND THE FEDERAL WATER POLLUTION CONTROL ACT:**

**Description:** Contracts and subgrants of amounts in excess of \$150,000 must include a provision requiring the contractor to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401–7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251– 1387) and to report all violations to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

**Suggested Language:**

➤ Clean Air Act:

1. “The contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C. § 7401 et seq.
2. The contractor agrees to report each violation to the (name of applicant entering into the contract) and understands and agrees that the (insert name of the applicant entering into the contract) will, in turn, report each violation as required to assure notification to the appropriate Environmental Protection Agency Regional Office, and the Federal awarding agency, or USDA.
3. The contractor agrees to include these requirements in each subcontract exceeding \$150,000 financed in whole or in part with Federal assistance provided by Federal funds.”

➤ Federal Water Pollution Control Act:

1. “The contractor agrees to comply with all applicable standards, orders, or regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1251 et seq.
2. The contractor agrees to report each violation to the (name of the applicant entering into the contract) and understands and agrees that the (insert name of the applicant entering into the contract) will, in turn, report each violation as required to assure notification to the appropriate Environmental Protection Agency Regional Office, and the Federal awarding agency, or USDA.
3. The contractor agrees to include these requirements in each subcontract exceeding \$150,000 financed in whole or in part with Federal funds.”

**9. DEBARMENT AND SUSPENSION:**

**Description:** Grantees, contractors, and subcontractors (at any level) that enter into covered transactions are required to verify that the entity (as well as its principals and affiliates) they propose to contract or subcontract with is not excluded or disqualified. USDA/FNS follows the guidance in 2 CFR part 180, *OMB Guidelines to Agencies on Governmentwide Nonprocurement Debarment and Suspension*, as well as related *Executive Orders 12689 and 12549*, which requires verification that the person with whom they intend to do business has not been excluded or disqualified when entering into a transaction covered by this section.

This verification may be done by using one of the following methods:

1. Checking the System for Award Management (SAM) or the Excluded Parties List System (EPLS);  
or
2. Collecting a certification from that person; or
3. Adding a clause or condition to the covered transaction with that person.

**Required Form when using method #2:**

The authorized USDA Nonprocurement Debarment and Suspension Certification form for lower tiered covered transactions **must** be used and the language **cannot** be deviated from in any way.

[https://www.rd.usda.gov/files/AD1048\\_DebarmentCert\\_LowerTierCovered.pdf](https://www.rd.usda.gov/files/AD1048_DebarmentCert_LowerTierCovered.pdf)

If a state or local agency would like to ask for additional certification information than what is on the form, they must do so **under a separate certification/authority**. The goal of the Nonprocurement Debarment and Suspension Certification is to protect the Federal government, not to diminish competition, and by including language that moves beyond the certification authority outlined in 2 CFR part 180, the certification process is moving beyond the requirements for certification and information disclosure for lower tier participants found at 2 CFR 180.300 and 180.355.

**Suggested language when using method #3:**

- “The Contractor understands that a contract award (see 2 CFR 180.220) must not be made to parties listed on the government wide exclusions in the System for Award Management (SAM) or the Excluded Parties List System (EPLS), in accordance with the OMB guidelines at 2 CFR 180 that implement Executive Orders 12549 (3 CFR part 1986 Comp., p.189) and 12689 (3 CFR part 1989 Comp., p. 235), “Debarment and Suspension.”

By signing and submitting its bid or proposal, the bidder or proposer certifies as follows: The certification in this clause is a material representation of fact relied upon by {insert name of school district}. If it is later determined that the bidder or proposer knowingly rendered an erroneous certification, in addition to remedies available to {insert name of school district}, the Federal Government may pursue available remedies, including but not limited to suspension and/or debarment. The bidder or proposer agrees to comply with the requirements of 2 CFR 180.220 while this offer is valid and throughout the period of any contract that may arise from this offer. The bidder or proposer further agrees to include a provision requiring such compliance in its lower tier covered transactions.”

**10. BYRD ANTI-LOBBYING AMENDMENT:**

**Description:** Contractors that apply or bid for an award exceeding \$100,000 must file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the non-Federal award.

Contractors who apply or bid for an award of \$100,000 or more shall file the required certification. Each tier certifies to the tier above that it will not and has not used federally-appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, officer or employee of Congress, or an employee of a Member of Congress in connection with obtaining any federal contract, grant, or any other award covered by 31 U.S.C. § 1352. Each tier shall also disclose any lobbying with non federal funds that takes place in connection with obtaining any federal award. Such disclosures are forwarded from tier to tier up to the recipient who in turn will forward the certification(s) to the awarding agency. If applicable, the contractor must sign and submit to the non-federal entity, a certification regarding lobbying activities.

**Suggested Language and Required Form:**

- “Contractors that apply or bid for an award exceeding \$100,000 must file the required anti-lobbying certification. Each tier must certify to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the Customer. As applicable, Contractor agrees to file all certifications and disclosures required by, and otherwise comply with, the Byrd Anti-Lobbying Amendment (31 USC 1352). Contractor certifies that it is currently in compliance with all applicable provisions of the Byrd Anti-Lobbying Amendment (31 U.S.C. 1352) and will continue to be in compliance throughout the term of the Contract and further certifies that:

No Federal appropriated funds have been paid or will be paid by or on behalf of the Contractor, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of a Federal contract, the making of a Federal Grant, the making of a Federal Loan, the entering into a cooperative Master Agreement, and the extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative Master Agreement.

If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing, or attempting to influence, an officer or employee of a Member of Congress in connection with a Federal contract, grant, loan, or cooperative Master Agreement, Contractor shall complete and submit [Standard Form – LLL, “Disclosure Form to Report Lobbying”](#) in accordance with its instructions.

Contractor shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative Master Agreements) and that all subcontractors shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certificate is a prerequisite for making or entering into this transaction imposed by Section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.”

#### **11. PROCUREMENT OF RECOVERED MATERIALS PURSUANT TO 2 C.F.R. § 200.323:**

**Description:** A Non-Federal entity that is a state agency or agency of a political subdivision of a state and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired during the preceding fiscal year exceeded \$10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

**Suggested Language:**



- “In the performance of this contract, the Contractor shall make maximum use of products containing recovered materials that are EPA-designated items unless the product cannot be acquired:
  1. Competitively within a timeframe providing for compliance with the contract performance schedule;
  2. Meeting contract performance requirements; or
  3. At a reasonable price.

Information about this requirement, along with the list of EPA-designated items, is available at EPA's Comprehensive Procurement Guidelines web site:

<https://www.epa.gov/smm/comprehensiveprocurement-guideline-cpg-program>.

The Contractor also agrees to comply with all other applicable requirements of Section 6002 of the Solid Waste Disposal Act.”

## **12. PROHIBITION ON CERTAIN TELECOMMUNICATIONS AND VIDEO SURVEILLANCE SERVICES OR EQUIPMENT PURSUANT TO 2 CFR § 200.216:**

**Description:** Contractors and subcontractors are prohibited from using federal funds to enter into, extend or renew contracts for covered equipment, services, or systems that use covered telecommunications as a substantial or essential component of any system or critical technology as part of any system.

The covered telecommunications equipment or services includes equipment produced by Huawei Technologies Company or ZTE Corporation and video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company. It also includes equipment or services produced by any subsidiary or affiliate of such entities. The Secretary of Defense may also add entities it reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

### **Suggested Language:**

- “Pursuant to 2 CFR 200.216, Contractor shall not offer equipment, services, or system that use covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. Covered telecommunications equipment or services means 1) telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities); 2) for the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities); 3) telecommunications or video surveillance services provided by such entities or using such equipment; or 4) telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country. Respondent must comply with requirements for certifications. The provision at 48 C.F.R Section 52.204-26 requires that offerors review SAM prior to completing their required representations. This rule applies to all acquisitions, including acquisitions at or below the simplified acquisition threshold and to acquisitions of commercial items, including commercially available off the-shelf items.”

## **13. DOMESTIC PREFERENCES FOR PROCUREMENTS PURSUANT TO 2 CFR § 200.322:**

**Description:** As appropriate and to the extent consistent with law, the non-Federal entity should, to the greatest extent practicable under a Federal award, provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States. This is implemented through the program regulations. See **“BUY AMERICAN”**.

#### **14. Buy American:**

**Description:** 7 CFR 210.21(d) requires that SFAs purchase, to the maximum extent practicable, domestic commodities or products. A domestic commodity or product is an agricultural commodity that is processed in the United States (including U.S. Territories) and/or a food product that is processed in the United States (including U.S. Territories) substantially using agricultural commodities that are produced in the United States (including U.S. Territories). A Buy American Provision is required to be included in solicitations and agreement or contracts when procuring food that are considered “food components.” FNS defines a food component as one of the food groups that comprises reimbursable meals: meats/meat alternates, grains, vegetables, fruits, and fluid milk. Foods that are unprocessed, agricultural commodities must be domestic. All processed food products must contain over 51% of the product’s food component, by weight or volume, from U.S. origin (including U.S. Territories) and be processed in the United States (including U.S. Territories).

There are two (2) limited exceptions to Buy American requirements:

1. The product is not processed or manufactured in the U.S. in sufficient and reasonably available quantities of a satisfactory quality; or
2. Competitive bids reveal the costs of a U.S. product are significantly higher than the non-domestic product.

Exceptions must be requested by vendors and approved by SFAs prior to accepting or receiving non-domestic foods.

#### **Suggested Language:**

When asking suppliers to provide information about the percentage of U.S. content for individual processed end products:

- “We require bidders to certify that (insert product name) was processed in the U.S. and contains over (insert % of weight or volume) of its agricultural food component from the U.S.,” with space for the supplier to fill in the name of the product and its percentage of the domestic agricultural food component (by weight or volume) contained therein.”

#### **Suggested Language:**

- “The District/State agency/Territory participates in the National School Lunch Program and School Breakfast Program and is required to use the nonprofit food service funds, to the maximum extent practicable, to buy domestic commodities or products for Program meals. A ‘domestic commodity or product’ is defined as one that is either produced in the U.S. or is processed in the U.S. substantially using agricultural commodities that are produced in the U.S. as provided in 7 CFR 210.21(d).”

Exceptions to the Buy American provision are very limited; however, an alternative or exception may be approved upon request. To be considered for an alternative or exception, the request must be submitted in writing to a designated official, a minimum of \_\_\_ day (s) in advance of delivery. The request must include the following:

1. Alternative substitute(s) that are domestic and meet the required specifications:
  - a) Price of the domestic food alternative substitute(s); and
  - b) Availability of the domestic alternative substitute(s) in relation to the quantity ordered.
2. Reason for exception: Identify if for limited/lack of availability or price (include price):
  - a) Price of the domestic food product and

- b) Price of the non-domestic product that meets the required specification of the domestic product.”

**15. COST REIMBURSABLE CONTRACTS:**

**Description:** 7 CFR 210.21(f) requires SFAs to include the following provisions in all cost reimbursable contracts, including contracts with cost reimbursable provisions, and in solicitation documents prepared to obtain offers for such contracts.

**Required information and statements that must be included in solicitation and contract documents:**

1. Allowable costs will be paid from the nonprofit school food service account to the contractor net of all discounts, rebates and other applicable credits accruing to or received by the contractor or any assignee under the contract, to the extent those credits are allocable to the allowable portion of the costs billed to the school food authority;
2. The contractor must separately identify for each cost submitted for payment to the school food authority the amount of that cost that is allowable (can be paid from the nonprofit school food service account) and the amount that is unallowable (cannot be paid from the nonprofit school food service account); or
3. The contractor must exclude all unallowable costs from its billing documents and certify that only allowable costs are submitted for payment and records have been established that maintain the visibility of unallowable costs, including directly associated costs in a manner suitable for contract cost determination and verification;
4. The contractor's determination of its allowable costs must be made in compliance with the applicable Departmental and Program regulations and Office of Management and Budget cost circulars;
5. The contractor must identify the amount of each discount, rebate and other applicable credit on bills and invoices presented to the school food authority for payment and individually identify the amount as a discount, rebate, or in the case of other applicable credits, the nature of the credit. If approved by the State agency, the school food authority may permit the contractor to report this information on a less frequent basis than monthly, but no less frequently than annually;
6. The contractor must identify the method by which it will report discounts, rebates and other applicable credits allocable to the contract that are not reported prior to conclusion of the contract; and
7. The contractor must maintain documentation of costs and discounts, rebates and other applicable credits, and must furnish such documentation upon request to the school food authority, the State agency, or the Department.

**16. GEOGRAPHIC PREFERENCE:**

**Description:** A geographic preference for vendors is not allowable in the federal regulations unless provided for in a federal programs' specific regulations. 7 CFR 210.21(g) provides an allowance for SFAs to include a geographic preference for vendors when the SFA is procuring unprocessed locally grown or locally raised agricultural products. When utilizing the geographic preference to procure such products, the school food authority making the purchase has the discretion to determine the local area to which the geographic preference option will be applied. When applying a geographic preference to procure unprocessed locally grown or locally raised agricultural products, SFAs must

ensure that solicitation and contract documents clearly define and describe how this will be evaluated for contract award and in contract monitoring procedures as applicable.

**No Suggested or Required Language.** Language used must clearly define what the SFA considers “local”.

#### **17. PROCESSING USDA FOOD CONTRACTS:**

**Description:** 2 CFR 250.31(b) identifies the minimum information that must be included in procurement contracts and solicitations for processed end products containing USDA foods in addition to requirements related to the procurement method used. The goal is to ensure that federal rules requiring full and open competition are followed and to assist SFAs in ensuring that they receive credit for the value of USDA foods in finished end products.

**Required information that must be addressed in solicitations and contracts when procuring processed end products containing USDA donated foods:**

- 1) The price to be charged for the end product or other processing service;
- 2) The method of end product sales that will be utilized and assurance that crediting for donated foods will be performed in accordance with the applicable requirements for such method of sales in §250.36;
- 3) The value of the donated food in the end products; and
- 4) The location for the delivery of the end products.

#### **18) PROCUREMENT AGENTS:**

**Description:** USDA Policy Memo SP 05-2017 establishes the guidance that must be followed when procuring a procurement agent who will procure goods and services on behalf of the SFA. The procurement agent must confirm in its response to the solicitation that it will represent the client and will have the client’s best interests exclusively in mind when preparing solicitations for publication on the client’s behalf. The agent may not have any conflict of interest, real or apparent. For example, the agent may not use pre-existing contractual relationships in lieu of conducting a competitive procurement on behalf of the Program operator.

**Required Solicitation Language:**

- “When procuring goods or services for their client, agents must follow procedures consistent with 2 CFR 200.317-.327 and applicable program regulations.”